No. 80-2078

IN THE

Supreme Court of the United States

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT.

BRIEF FOR PETITIONER.

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Questions Presented for Review.

1. Whether the President has statutory or inherent constitutional authority (a) to extinguish statutory rights of American citizens to litigate commercial claims against foreign states and their agencies and instrumentalities in United States courts and (b) to nullify final judgments of United States courts adjudicating such claims?

2. Whether the President has statutory or inherent constitutional authority (a) to nullify attachments and judgment liens imposed by process of United States courts on property of foreign states and their agencies and instrumentalities to secure and satisfy enforceable commercial claims and judgments of American citizens and (b) to order the transfer of such property out of the reach of process of United States courts?

3. Whether, if the President has such authority, his exercise of it in this case constitutes a taking of property which should be enjoined in the absence of a reasonable, certain, and adequate provision for Petitioner's obtaining compensation?

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Respondents.

BRIEF FOR PETITIONER.

Opinions Below.

The Order of the United States District Court for the Central District of California to be reviewed is unreported. It is set out in the Appendix to the Petition for a Writ of Certiorari Before Judgment (the "Appendix"), filed on June 10, 1981, at page 106.[1] No opinion was issued by the District Court, but a Memorandum relating to the District Court's Order was issued. App. 161. No judgment or opinion has been issued by the Court of Appeals.

Jurisdiction.

The Order to be reviewed is an order of the United States District Court for the Central District of California filed

[1]The Appendix is hereinafter cited by page number as "App. ____."

May 28, 1981, entered June 2, 1981, in the action known as *Dames & Moore v. Donald T. Regan*, No. CV 81-2064 LEW (Px) (C.D. Cal., June 2, 1981) (the "Action Below"). Notice of Appeal from that Order to the United States Court of Appeals for the Ninth Circuit has been filed (App. 163), and the appeal has been docketed in the Court of Appeals as *Dames & Moore v. Donald T. Regan*, No. 81-5450 (9th Cir., filed June 4, 1981). App. 162. Jurisdiction is conferred on this Court to review a case pending in the Court of Appeals, prior to judgment, under 28 U.S.C. § 1254(1).

Constitutional Provisions, Statutes, Executive Agreements, Executive Orders, and Regulations Involved.

This case involves the following constitutional provisions, statutes, Executive agreements, Executive orders, and regulations: U.S. Const. art. I, §§ 1, 8, art. II, § 2, art. III, §§ 1, 2, art. IV, amend. V; Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.*; International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, *et seq.*; 3 U.S.C. § 301; 22 U.S.C. § 1732; 28 U.S.C. §§ 1254, 1330-1332, 1391, 1651, 2201-2202; 50 U.S.C. § 1631; Fed. R. Civ. P. 54, 56, 64, 69; Executive Orders Nos. 12,279-12,281, 12,294; Iranian Assets Control Regulations, 31 C.F.R. Part 535, §§ 535.213 (46 Fed. Reg. 26,447, as amended by 46 Fed. Reg. ____), 535.214 (46 Fed. Reg. 26,477, as amended by 46 Fed. Reg. ____), 535.215 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,477), 535.218 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,477), 535.219 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. ____), 535.221 (46 Fed. Reg. 14,335, as amended by 46 Fed. Reg. ____), 535.222 (46 Fed. Reg. 14,335), 535.504 (46 Fed. Reg. 14,336, as amended by 46 Fed. Reg. 26,477), 535.579 (46 Fed. Reg. 14,336); the Declaration of the Government of the Democratic and Popular Republic of Algeria ("Assets Declaration"); and the Declaration of the Government of the Democratic and Pop-

ular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (''Tribunal Declaration''). The pertinent texts of the foregoing are set forth in the Appendix.

Statement of the Case.

The only factual record before the District Court, and this Court, is Petitioner's verified complaint (''Complaint''), which is set out in full, including exhibits, at App. 1-87. The Government did not contest any of the factual allegtions in the Complaint. The facts, as therein alleged, are hereinafter set forth.

Petitioner initially filed a suit in the United States District Court for the Central District of California against the Government of Iran (''Iran''), the Atomic Energy Organization of Iran (''AEOI''), and certain Iranian banks (the ''Bank Defendants''). *Dames & Moore v. Atomic Energy Organization of Iran*, No. CV 79-04918 LEW (Px) (C.D. Cal.) (the ''Underlying Action''). Complaint, Paras. 6 and 7. Thereafter, commencing in December 1979, the District Court issued writs of attachment; the writs were served on third parties in California; and property of certain of the Bank Defendants, including deposit accounts, was thereby attached to secure Petitioner's claims. Complaint, Para. 8.

On February 18, 1981, the District Court entered final judgment in favor of Petitioner against Iran and the AEOI in the amount of $3,788,930.79, plus interest. Complaint, Para. 6 and Exhibit A. The Underlying Action is still pending against the Bank Defendants. Complaint, Para. 7. In March 1981, the Superior Courts of Clark and Snohomish Counties, State of Washington, issued writs of execution and garnishment in enforcement of Petitioner's judgment, and a sheriff's execution sale of certain Iranian property was noticed in Clark County, State of Washington. Complaint, Para. 9 and Exhibits B and C.

On January 19, 1981, President Carter entered into the so-called Algerian Declarations (App. 21-35), in which he agreed that, in return for Iran's releasing America's hostages, the President would undertake, *inter alia*, to terminate all lawsuits of American citizens pending in the United States against Iran and its agencies and controlled entities, to nullify all attachments and judgments obtained by American citizens in such lawsuits, and to transfer out of the country all Iranian property here (estimated at $4,500,000,000). As part of the Algerian Declarations, the President and his Iranian counterparts agreed to set up an Arbitral Tribunal, to be funded initially with $1,000,000,000 of Iranian assets, to which some, but not all, American citizens might present their claims. Whether the Tribunal will function at all, when (if ever) it will complete its work, and whether it will be funded by Iran beyond the initial $1,000,000,000 are all unknown. *See Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM), slip op. at 82 (S.D.N.Y., June 11, 1981). Whether Petitioner's claim in its Underlying Action is within the jurisdiction of the Arbitral Tribunal is highly uncertain.[2]

On January 19, 1981, President Carter also issued a series of Executive orders implementing the Algerian Declara-

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[2]The Tribunal has no jurisdiction over:

> claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts . . . .

Tribunal Declaration, Art. II. App. 31. The contract on which Petitioner's Underlying Action is based provides:

> Any dispute or disagreement arising under this Contract shall first be discussed amicably by both parties. Failing agreement, such dispute or disagreement shall be submitted to conciliation. Each party shall have the right to appoint one conciliator and a third conciliator shall be appointed by the Plan and Budget Organization of the Government of Iran. In the event that either party is unwilling to accept the decision of the conciliation board, the matter shall be decided finally by resort to the courts of Iran.

Complaint, Para. 13.

tions. Among these, Executive Order Nos. 12,279, 12,280, and 12,281 (App. 43, 46, and 49) purport to nullify attachments on all Iranian property remaining in this country and to order persons holding Iranian property to transfer such property to the Federal R serve Bank of New York (for transfer by the Government to Iran) or directly to Iran. The Executive orders further purport to grant a "full acquittance" to persons who transfer Iranian property in compliance therewith, even in violation of judicial orders or other court processes, and purport to prohibit United States litigants from acquiring new interests, by judgment or otherwise, in Iranian property now in the United States.

On February 24, 1981 (after Petitioner's final judgment against Iran and the AEOI had been entered in the Underlying Action), President Reagan, who had inherited the Algerian Declarations from President Carter, issued Executive Order No. 12,294 (App. 52), which provides:

> All claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the [Tribunal Declaration], and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal. During the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States . . . or in any action commenced in any such court after the effective date of this Order.

App. 52-53. This "suspension" of American claims is terminated if and when the Tribunal rules that it does not have jurisdiction over the claim. Any determination of the Tribunal on the merits is final and binding. App. 53.

The effect of the Algerian Declarations and the implementing Executive orders, if valid, on Petitioner's Underlying Action was devastating: Petitioner's final judgment against Iran and the AEOI, Petitioner's judgment levies on Iranian property, and Petitioner's attachments on property

of the Bank Defendants were all nullified; the property so liened as Petitioner's security was all to be transferred out of the country; and Petitioner was left only to take its claim to the Arbitral Tribunal, which might well conclude eventually that it had no jurisdiction over it.

To avert this emasculation of its rights, Petitioner filed the Action Below, seeking (1) a preliminary and permanent injunction enjoining the Government from interference with proceedings in, or related to, the Underlying Action, and (2) a declaratory judgment that the Algerian Declarations, and the implementing Executive orders and regulations, to the extent that they purported to authorize such interference, were beyond the constitutional and statutory powers of the President and therefore void. Prayer to Complaint, App. 10-12. Petitioner moved for a preliminary injunction, and the Government moved to dismiss Petitioner's Complaint for failure to state a claim upon which relief could be granted. By its Order filed May 28, 1981, entered June 2, 1981, the District Court denied Petitioner's motion and granted the Government's motion. App. 106. It is these rulings of the District Court that are now before this Court for review.

Summary of Argument.

The President has: (1) extinguished statutory rights of American citizens to litigate in United States courts commercial claims against a foreign state and its agencies and instrumentalities (hereinafter collectively "foreign state"), and nullified judgments on such claims; and (2) nullified judicial liens securing such claims, and ordered the transfer of all property so liened out of the country. Neither presidential action is authorized.

In the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602, *et seq.*, Congress, acting under its Article I powers, placed commercial claims of American citizens against foreign states squarely within the jurisdiction of federal district courts, and thereby removed the Executive

from its historic role in the resolution of such claims. The President's action here, removing such claims from United States courts and transferring them to an international forum, contravenes the express will of Congress.

Even were that not so, no President has ever done what has been attempted here. A review of the cases and international agreements cited by the Government reveals no Executive settlement of a commercial claim of a private American citizen against a foreign state pending and enforceable in an American court at the time of settlement. The President does not have any inherent authority to settle or remove enforceable claims of Americans properly before Article III courts.

The Government contends that the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701, *et seq.*, authorizes the President to nullify judicial liens on property of foreign states securing the claims of American creditors and to transfer the property so liened out of the country. IEEPA does authorize temporary blocking and freezing of foreign property. However, when read against the background of its predecessor statute, the Trading With the Enemy Act, 50 U.S.C. App. §§ 1, *et seq.*, and the legislative purposes of both Acts, IEEPA does not authorize the President permanently to transfer foreign property away from American creditors and back to a hostile power.

Even if the President's actions here were authorized, Petitioner's judgment, and its attachments and judgment liens securing the same, are property interests protected by the Fifth Amendment that have been taken for public use. Although the amount of compensation due Petitioner for these takings may not currently be quantifiable, the Fifth Amendment requires that Petitioner now be afforded a reasonable, certain and adequate provision for just compensation. In the absence of such provision, the President's actions should be enjoined.

ARGUMENT.

I.

THE PRESIDENT DOES NOT HAVE STATUTORY OR INHERENT CONSTITUTIONAL AUTHORITY TO EXTINGUISH STATUTORY RIGHTS OF AMERICAN CITIZENS TO LITIGATE COMMERCIAL CLAIMS AGAINST FOREIGN STATES IN UNITED STATES COURTS OR TO NULLIFY FINAL JUDGMENTS OF UNITED STATES COURTS ADJUDICATING SUCH CLAIMS.

In the various decisions arising out of the Algerian Declarations, the only ground of firm agreement among the lower courts has been that this Court's decision in the steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), is the guiding precedent and that the analytical framework set forth in Justice Jackson's concurring opinion in that case provides the most useful point of departure. Justice Jackson identified three categories into which the President's powers could fall. First, where the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. Second, absent a congressional grant or denial of authority, the President can rely only upon his own independent powers, although there is a "zone of twilight" in which he and Congress may have concurrent authority or in which the distribution of authority is uncertain. Third, where the President acts contrary to the will of Congress, he can rely only upon his own constitutional powers minus any constitutional powers of Congress, and his power is at its lowest ebb. *Id.* at 635-38 (concurring opinion).

Petitioner contends that the President's action here — abrogating Petitioner's statutory right of access to a United States court and the processes and judgments thereof — defies the will of Congress, must therefore be measured by the third and most restrictive of Justice Jackson's standards, and plainly fails under that test. The Government contends, however, that the President has simply exercised established presidential power to settle international claims.

There is no judicial authority or historical precedent, either long and uninterrupted or occasional and fleeting, that supports Executive authority to undertake action of the sort attempted here. Furthermore, the presidential action here in issue directly implicates other sensitive features of our Constitution's scheme of governance — the jurisdiction of the federal courts and orders and judgments issued by those courts. Even under Justice Jackson's intermediate standard of review, no less than under his most restrictive standard, the Executive action here cannot be sustained.

A. In Enacting the Foreign Sovereign Immunities Act, Congress Removed From the Domain of the Executive the Resolution of Commercial Claims by American Citizens Against Foreign States and Placed Such Claims Within the Jurisdiction of the United States District Courts.

After years of careful consideration, Congress in 1976 enacted the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602, *et seq.*[3] FSIA was passed to accomplish two overriding purposes: first, to enable American citizens to sue foreign states over commercial disputes in United States courts, and to provide a means to satisfy any judgments obtained; and second, to depoliticize these commercial lawsuits by taking them out of the arena of foreign affairs — where the Executive Branch is subject to pressures of foreign states seeking to avoid liability through a grant of immunity — and by placing them within the exclusive jurisdiction of the courts.[4]

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[3]*See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) ("FSIA House Report"), *reprinted in* [1976] U.S. Code Cong. & Ad. News 6605, 6608 (citations hereinafter are to U.S. Code Cong. & Ad. News pagination).

[4]FSIA House Report at 6605-07, 6610-11, 6613; *see Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. (June 2 and 4, 1976) ("*1976 House Committee Hearings*").

To accomplish these dual purposes, Congress exercised its constitutional authority, including specifically its authority to regulate foreign commerce and prescribe the jurisdiction of Article III courts, by vesting subject matter and personal jurisdiction in the federal district courts over commercial suits brought by United States claimants against foreign states. 28 U.S.C. § 1330; *see* FSIA House Report at 6611. Congress further fully codified the restrictive theory of sovereign immunity and provided that non-immune foreign states "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Congress also sought to insure that the rights of United States claimants against foreign states, as adjudicated by Article III courts, would be enforceable in this country. Thus, FSIA provides means to effect service on foreign states, procedures for attachments in certain circumstances, and, for the first time in United States law, the right to execute on the commercial property of foreign states in satisfaction of judgment. *Id.* §§ 1608-1611.[5]

Underscoring its intent to depoliticize private commercial disputes with foreign states, Congress declared that henceforth such disputes would be resolved in the courts without Executive interference:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions

[5]Before FSIA, American claimants who obtained judgments against foreign states had no means by which to enforce the judgments and were forced to rely upon diplomatic intervention for that purpose. *See* FSIA House Report at 6605, 6610-11, 6625-26; *1976 House Committee Hearings* at 28, 58-59.

are made on purely legal grounds and under procedures that insure due process.[6]

In addition to this explicit statement of purpose, the legislative history is replete with statements and testimony by members of Congress, the Executive Branch and the private bar emphasizing the urgent need to strip from the Executive the authority to terminate pending litigation through invocation of the immunity doctrine.[7] It is clear that Congress intended, through the enactment of FSIA, to avoid the very kind of bargaining away of American claimants' rights that is now being attempted through the Algerian Declarations.

Under the absolute theory of sovereign immunity adopted by judicial decision at the turn of the nineteenth century in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), foreign states were held immune from suit and courts would adhere to suggestions of immunity offered by the Executive on behalf of a defendant foreign state. *See, e.g., Ex parte Peru*, 318 U.S. 578, 587 (1943). In the early twentieth century, the increase in trade between foreign states and the nationals of another country led to international recognition of the restrictive theory of sovereign immunity — foreign states are not immune from suit based on their commercial or private acts.[8] This theory was even-

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[6]FSIA House Report at 6606; *see, e.g.*, Atkeson, Perkins & Wyatt, *H.R. 11315 — The Revised State-Justice Bill On Foreign Sovereign Immunity: Time For Action*, 70 Am. J. Int'l L. 298, 311 (1976); Note, *The Foreign Sovereign Immunities Act of 1976: Giving The Plaintiff His Day In Court*, 46 Ford. L. Rev. 543, 544 (1977); Note, *Sovereign Immunity — Limits of Judicial Control — The Foreign Sovereign Immunities Act of 1976*, 18 Harv. Int'l L.J. 429, 436 (1977) ("*Sovereign Immunity*").

[7]*See, e.g.*, FSIA House Report at 6605-07; *1976 House Committee Hearings* at 24-25, 27-35, 50-53, 58-60.

[8]Under the restrictive theory, "the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)." FSIA House Report at 6605. Even under the restrictive theory, however, execution against foreign state property was not permitted. *Id.* at 6606, 6625-26; *see, e.g., Sovereign Immunity* at 446-48.

tually adopted in the United States by the State Department in the Tate letter of 1952.[9]

Notwithstanding the Tate letter, the State Department found it politically infeasible consistently to resist demands of foreign states to dispose of pending litigation against them through suggestions of immunity.[10] Thus, private litigants remained subject to the vicissitudes of the international political arena, always subject to having their legal claims bargained away by the President when the foreign state was able to exert sufficient pressure:

> From a foreign relations standpoint, the initiative [was] left to the foreign state. The foreign state [chose] which sovereign immunity determinations it [would] leave to the courts, and which it [would] take to the State Department. The foreign state also decide[d] when it [would] attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

FSIA House Report at 6607.[11]

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[9]Letter from Jack B. Tate, Acting Legal Advisor to the Department of State, to Philip Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984 (1952). *See generally Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698-705 (1976) (tracing development of sovereign immunity doctrine in the United States).

[10]*1976 House Committee Hearings* at 25, 34-35; *see* FSIA House Report at 6606, 6608, 6610 (FSIA was "designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to 'suggestions of immunity' from the executive branch").

[11]*See 1976 House Committee Hearings* at 60 (testimony of Peter D. Trooboff, Co-Chairman, Committee on Transnational Judicial Procedure, ABA International Law Section: "The [State] Department then finds itself with a political problem that it did not create and which, more than not, it may not need or want. In these circumstances, it is fair to say that the 'bargaining chip' represented by a sovereign immunity case belongs to the foreign state — not to the Department"). Others have also noted that, prior to FSIA, private claims were sacrificed in the interests of foreign policy. *E.g.*, Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law In Actions Against Foreign States*, 18 Colum. J. Transnat'l L. 211, 216 (1979).

An example of the use of a private claim as a bargaining chip that achieved substantial notoriety (and was later cited during the committee hearings on FSIA) arose out of the hijacking of an American airplane to Cuba. *See,* Note, *Proposed Draft Legislation on the Sovereign Immunity of Foreign Governments: An Attempt to Revest the Courts With a Judicial Function*, 69 Nw. U. L. Rev. 302, 311-13 (1974) (discussing *Rich v. Naviera Vacuba,* 197 F. Supp. 710 (E.D. Va.), *aff d*, 295 F.2d 24 (4th Cir. 1961)). While the hijacked plane remained in Cuba, a Cuban commercial vessel was commandeered by its crew, who then sought asylum in the United States. After the Cuban vessel made port in the United States, several American claimants attempted to attach the vessel to satisfy outstanding commercial claims. Only two days earlier, Cuba had released the hijacked American airplane, stating that:

> [I]f the Government of the United States guarantees the right of immunity and sovereignty of the boats and airplanes belonging to the Cuban people that are seized in our country and taken to United States territory as proclaimed in the note submitted by the Government of the United States to the Security Council . . . the Government of Cuba will accord reciprocal treatment to American boats and airplanes that are in a similar situation.

45 Dep't State Bull. 407-08 (1961). Quickly responding to the Cuban statement, the State Department filed a suggestion of immunity in the actions pending against the Cuban vessel, resulting in dismissal of the actions. The result in the *Naviera* case was criticized both by commentators[12] and by Congress.[13]

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[12]*See, e.g.*, Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 Fordham L. Rev. 543, 548-49 (1977); Note, *Proposed Draft Legislation on Sovereign Immunity of Foreign Governments: An Attempt to Revest the Courts With a Judicial Function*, 69 Nw. U. L. Rev. 302, 311-13 (1974).

[13]*See* von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnat'l L. 33, 33 n.1 (1978) (shortly after *Naviera*, Senator Ervin introduced a bill designed "to provide means of redress for the unlawful seizure of American property by foreign governments," which bill would have removed the immunity defense in such cases).

During the committee hearings on FSIA, representatives of the Executive Branch candidly acknowledged that the State Department's suggestion of immunity practice, even under the Tate letter, worked to the disadvantage of United States foreign policy:

> I can't think of any [advantages] and may I say that I think there are some disadvantages attaching to the power of being able to enter a political judgment in the court because it means that the State Department becomes involved in a great many cases where we would rather not do anything at all, but where there is enormous pressure from the foreign government that we do something. . . . [I]n practice I would have to say to you in candor that the State Department, being a political institution, has not always been able to resist these pressures. And to my way of thinking, this consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established.[14]

Not only did Congress thus remove the claims of private litigants from the control of the Executive Branch, but it expressly considered and rejected providing the Executive with flexibility to deal with emergency situations such as the airplane hijack situation exemplified by *Rich v. Naviera*

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[14] *1976 House Committee Hearings* at 34-35 (testimony of Monroe Leigh, Legal Advisor, Department of State); *cf. id.* at 59 (testimony of Peter D. Trooboff: "Under present law it may appear that the Department [of State] is able to fulfill certain foreign policy objectives by passing upon claims to immunity by foreign states against which actions are pending in American courts. The administration has concluded after long study that the relinquishment of this role under the pending bill would best serve the foreign policy interests of the United States"); Richard, *Sovereign Immunity — Proposed Statutory Elimination of State Department Role — Attachment, Service of Process, and Execution*, 15 Harv. Int'l L. J. 157, 170 (1974) (policy considerations weigh heavily in favor of eliminating Executive role: "First, if immunity is used as a political bargaining chip, it may be granted most often to sovereigns in relation to whom the interests of the United States are in jeopardy, with the result that enemies gain more from its use than allies").

Vacuba. Congress, after hearing the testimony of those opposed to, and the lone speaker in favor of, retaining any Executive flexibility in emergencies, concluded that the foreign policy of the United States would better be served, even in emergencies, by the absence of Executive control over such suits.[15] This view was forcefully stated by Congressman Flowers:

> [T]he so-called flexibility the State Department has under any present practice, if it is flexibility, is achieved at a price that is paid by some individual citizen or corporation. *That is not the way this Government does business and it is not the way we ought to do business.*[16]

In sum, then, FSIA represents a carefully considered congressional enactment expressly designed to confer upon American claimants a judicially enforceable right to sue foreign states for their commercial activities. To assure that those rights could not be destroyed by foreign state defendants through the political invocation of sovereign immunity, Congress insulated judicial proceedings from the foreign affairs role of the Executive Branch. What the Government seeks to do today is to reintroduce its political interference in judicial proceedings, ousting Petitioner from federal court, and depriving it of its judgment and liens

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[15] *See 1976 House Committee Hearings* at 24-32, 61-66, 67 (Congressman Danielson, in response to the suggestion that some Executive discretion should be left in FSIA to deal with political emergencies such as the *Naviera* hijack situation, stated his belief that eliminating the Executive's control over FSIA suits provided the Executive with a "strong[er] card" for foreign policy).

[16] *1976 House Committee Hearings* at 90 (emphasis added). Congress also exhibited sensitivity and resistance to allowing the Executive Branch the option to override or modify the guarantees of FSIA through future, unilateral Executive action. *1976 House Committee Hearings* at 51-52, 86-87. Congress deleted from FSIA a proviso in the State-Justice draft of the bill providing that FSIA should be subject to *future* international agreements, stating: "[I]t was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement." FSIA House Report at 6608.

against the Iranian defendants. In so doing, the Government flies in the very face of FSIA and would defy the will of Congress.

In these circumstances, Petitioner submits, the President's action should be measured by Justice Jackson's third and most restrictive standard in *Youngstown*:

> When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting on the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

343 U.S. at 637-38 (concurring opinion). The President's abrogation of statutory rights of access to the courts of this country in response to the hostage crisis can no more survive that standard than presidential seizure of private steel mills during time of war:

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority . . . labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was not deemed too high in view of the safeguards which these restrictions afford.

Id. at 613 (Frankfurter, J., concurring).

B. The President Has No Inherent Authority to Conclude Executive Agreements Extinguishing Statutory Rights of American Citizens to Litigate Commercial Claims Against Foreign States in United States Courts.

The Government suggests that the President has inherent constitutional authority to enter into the Algerian Declarations, stemming from his historical practice of settling claims of American citizens against foreign states.[17] Glossing over past Executive statements about the undesirability of using the claims of citizens in bargaining with foreign states, congressional disapproval of that practice through the enactment of FSIA, and the obvious conflict with the adjudicatory functions of Article III courts presently posed by implementation of the Algerian Declarations, the Government contends that a long-standing Executive claims settlement practice evidences congressional acquiescence in Executive abrogation of statutory rights like Petitioner's. However, neither the past Executive agreements settling claims nor any judicial precedent supports the President's purported ability to abrogate Petitioner's claim against Iran pending in court.

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[17]Notwithstanding FSIA, the Government argues that two statutes — the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701, *et seq.*, passed only months after the enactment of FSIA, and 22 U.S.C. § 1732, enacted over a century ago — authorize the President to "settle" Petitioner's claim. The Government is wrong. Neither IEEPA, *see American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779, slip op. at 27 n.15 (D.C. Cir., May 22, 1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027, slip op. at 13-14 & n.13 (1st Cir., May 22, 1981); *Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM), slip op. at 18-20 (S.D.N.Y., June 11, 1981); *Electronic Data Systems Corporation, Iran v. Social Security Organization of the Government of Iran*, No. CA3-79-218-F, slip op. at 21 (N.D. Tex., June 7, 1981), nor Section 1732, *see American Int'l Group, Inc. v. Islamic Republic of Iran*, slip op. at 1-3 (Mikva, J., concurring); *Electronic Data Systems Corporation, Iran v. Social Security Organization of the Government of Iran*, slip op. at 20 & n.31, empowers the Executive to abrogate pending claims of domestic creditors against Iran.

1. Past Executive agreements do not support the Government's claim of inherent authority.

Petitioner does not dispute, and this case does not involve, the proposition that the Executive has some power to settle claims of United States citizens against foreign states. The issue in this case is the *scope* of that power. Nothing in the historical practice of claims settlements suggests that the Executive may, without congressional approval, abrogate statutory rights of citizens to litigate commercial claims against foreign states in United States courts.

Petitioner's counsel has reviewed some 89 Executive agreements involving claims settlements between the United States and other countries from 1799 through 1979, including all of those that have been cited by the Government. None of those agreements purports to terminate enforceable commercial claims of American citizens then pending in the United States courts or to nullify judgments, attachments, or judgment liens issued by those courts. Indeed, before FSIA, commercial claims against foreign states had little or no value in American courts, and the claimant needed the aid of the Executive to achieve any recovery.[18] Far from being another step in an historical continuum of agreements benefiting claimants without enforceable rights, the present

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[18]*See* Section IA *supra*. Since the effective date of FSIA, it appears that the President has entered into only two Executive agreements settling claims, neither of which purports to interfere in any way with any proceedings pending in United States courts. The two agreements were with Egypt, Agreement Concerning the Settlement of Claims, May 19, 1979, United States-Egypt, T.I.A.S. No. 9589, and with the People's Republic of China, Agreement Concerning the Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306. The agreement with Egypt resolved claims which prior to FSIA the United States had broached diplomatically and which it had expressed its intention to negotiate. *See* Agreed Minute to Agreement Concerning Claims of United States Nationals, May 1, 1976, United States-Egypt, 27 U.S.T. 4214, 4228-30, T.I.A.S. No. 8446. The agreement with the People's Republic of China settled expropriation claims of U.S. nationals against China and unblocked assets of the PRC and its nationals.

Executive agreement marks a radical and novel departure from that pattern — depriving Petitioner of otherwise enforceable rights explicitly granted by an act of Congress.

2. There is no judicial precedent for the Government's claim of inherent authority.

The substantial majority of the Government's cases, most notably *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 107 (1801), involve treaties ratified by the Senate, not Executive agreements made unilaterally by the President. In *Schooner Peggy*, the officers and crew of a public armed vessel, commissioned by the President and operating under his instructions, brought a prize claim in admiralty seeking condemnation of a captured French ship. They had obtained a lower court condemnation sentence which was on appeal when, by treaty, the United States agreed to restore the ship to France. This Court held that the treaty constituted an intervening law that should be given effect on appeal. While *Schooner Peggy* does indicate that substantive law may be amended by treaty, it does not follow that the President, acting alone by Executive agreement, can change the substantive law or otherwise unilaterally terminate congressionally authorized litigation.[19]

Two other cases the Government relies on, *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), are likewise not on point. The cases are fundamentally Supremacy Clause cases, holding that the terms of an Executive agreement take precedence over a conflicting state law policy, *Belmont*, 301 U.S. at 331, or

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[19]*See United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 660 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1954). In addition to being a treaty case, *Schooner Peggy* is inapposite because the claimants were not private United States citizens but government agents asserting rights arising from their governmental authority. Moreover, the initial sentence of condemnation was on appeal and therefore had no effect at all, since in admiralty the appellate court hears the cause *de novo* "as if no sentence had been passed." *Schooner General Pinkney v. United States*, 9 U.S. (5 Cranch) 281, 283 (1809).

state court order, *Pink*, 315 U.S. at 233-34. While both cases mention the power of the President to settle claims through Executive agreement, they shed no meaningful light on the scope of that power. *See American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779, slip op. at 17 (D.C. Cir., May 22, 1981). Moreover, neither *Pink* nor *Belmont* involved the settlement of claims of American creditors.

3. Even if Congress has not expressly repudiated the type of Executive action taken here, the President's action cannot be sustained as an exercise of inherent authority.

Because the Algerian Declarations find no historical support in prior Executive agreements or judicial decisions, the Government cannot argue that Congress has acquiesced in past "settlements" such as the Algerian Declarations. Quite the opposite is true. In FSIA, Congress clearly acted to prevent Executive use of private claims, such as Petitioner's, as bargaining chips in the conduct of foreign affairs. Thus, the only constitutionally significant "acquiescence" at issue in this case is the Executive's previous willingness to relinquish its control over private commercial litigation against foreign states.

In light of the legislative history of FSIA — where the Executive stated that the political negotiation of private claims worked against United States foreign policy — this Court need not independently assess whether the power exercised in the Algerian Declarations is a necessary adjunct of inherent Executive authority in the realm of foreign affairs. The position of the Executive Branch on the need for FSIA reveals that the power to bargain with these private claims, even in political emergencies such as the hostage crisis, is not an indispensable element of inherent Executive

authority. This view seems to have been confirmed by the current Administration.[20]

Moreover, even apart from FSIA and assuming *arguendo* a silent record on the issue of Congress' approval or disapproval, such inherent power should not be presumed in view of its intrusion into the very core of authority the Constitution confers on the other coordinate branches. The Constitution explicitly grants Congress the authority to define the jurisdiction of the lower federal courts (and, within limits, the remedies they may provide).[21] Article III provides neither an implicit nor explicit role for the President in determining the jurisdiction of the federal courts. Even congressional interference with proceedings begun and properly before Article III courts is a matter of extreme constitutional sensitivity when, as here, it is undertaken not

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[20]Following a month-long study of the Algerian Declarations, the present Administration issued a statement that it would implement the prior Administration's agreement. However, the statement contained a number of important qualifications:

> . . . .
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> The review just completed did not consider: how could the whole crisis have been handled better; could a better set of agreements have been negotiated; *we did not consider whether these agreements should have been signed.*
>
> . . . .
>
> The conclusion of the agreements was a legal exercise of presidential authority. *This authority will be subject to challenge in our courts, and the Executive Branch will, of course, abide by the determination of our judicial system.* . . .
>
> It should be well understood that the decision to faithfully implement the agreements *does not represent a precedent* for future actions by the United States Government in similar situations. The present administration *would not have negotiated* with Iran for the release of the hostages. Future acts of state-sponsored terrorism against the U.S. will meet swift and sure punishment.

Iranian Assets Litigation Reporter (Andrews Publications) at 2501-02 (Feb. 20, 1981) (emphasis added).

[21]*See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).

for general purposes but rather to affect the outcome of specific pending cases.[22] As District Court Judge Porter said:

> I know of no cases, and counsel have cited none, which hold that the Executive Branch may, without statutory authority, and without the approval of Congress (such as formal Senate consent to a treaty) negate valid exercises of the judicial power exercised pursuant to an express grant of jurisdiction from Congress.
>
> * * * *
>
> In the absence of any clearer Congressional approval of the exercise of this power with respect to claims that have gone to judgment pursuant to the Foreign Sovereign Immunities Act, I cannot conclude that the suspension and nullification of the judgment in this case is valid. To do so would leave the judiciary subject to the unbridled whims of the Executive Branch, and render the orders and judgments of courts acting pursuant to express Congressional grants of jurisdiction mere advisory opinions.

Electronic Data Systems Corp., Iran v. Social Security Organization of the Government of Iran, No. CA3-79-218-F, slip op. at 23, 24-25 (N.D. Tex., June 7, 1981); *see Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM), slip op. at 31-35 (S.D.N.Y., June 11, 1981); *cf. Rich v. Naviera Vacuba*, 197 F. Supp. 710, 718 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961) (the district court, applying the principles of *Youngstown*, rejected the Executive's attempt to block service of attachment by the marshal of the court: "There is no statute expressly authorizing the Executive to effectively destroy the judicial process for, without the ability to serve the court process, the doors of the court may be forever closed").

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[22]*See United States v. Klein*, 80 U.S. (13 Wall.) 519 (1872). *But see Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

Claims of inherent Executive authority to override the rights and liberties of individual American citizens are suspect.[23] If trading the statutory rights of Americans is indispensable to the President's conduct of foreign affairs, Congress may confer that power expressly and with attention to protecting American citizens against any injury caused by the President's exercise of that authority.

> Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law.

Youngstown, 343 U.S. at 603-04 (Frankfurter, J., concurring).

II.
THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT LIMITS PRESIDENTIAL AUTHORITY TO THE TEMPORARY FREEZING OF FOREIGN ASSETS AND WITHDRAWS THE EXECUTIVE'S FORMER AUTHORITY PERMANENTLY TO DISPOSE OF ASSETS; THE ACT DOES NOT PERMIT A "TRANSFER" ORDER THAT PERMANENTLY DISPOSES OF FOREIGN PROPERTY AND EVADES THE STATUTORY RIGHTS OF AMERICAN CREDITORS.

The Government argues that, apart from the President's purportedly unlimited power to "settle" legal claims of American citizens against foreign states, the President is authorized under IEEPA to order the "transfer" of Iranian

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[23] In *Kent v. Dulles*, 357 U.S. 116 (1958), this Court found no statutory authorization for withholding a passport because of a citizen's alleged communist beliefs and associations, and, at least implicitly, rejected as well any inherent Executive authority under the foreign affairs powers:

> [T]he right [to travel abroad] is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. *Youngstown Sheet & Tube Co. v. Sawyer*.

Id. at 129.

property from the United States and to "nullify" all outstanding writs of attachment against Iranian property. Thus, the Government contends, even if the President does not have the unlimited authority to commandeer and dispose of citizens' substantive legal claims against foreign states, Congress has authorized him to render those claims academic by ordering the transfer of the debtor's property beyond the jurisdiction of United States courts and the reach of American creditors. The awesome Executive power the Government would read into IEEPA is wholly inconsistent with the purposes and legislative history of the Act and is totally unprecedented either in peacetime or wartime.

IEEPA was enacted in 1977 to limit presidential emergency powers in peacetime. Previously, presidential emergency powers both in times of peace and of war were exercised under the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. §§ 1, *et seq.*, which authorizes the President to take extraordinary measures, including summary seizure and vesting of foreign property. Observing that TWEA had become "essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review," Congress determined that such extreme wartime powers were inappropriate in peacetime emergencies. H.R. Rep. No. 459, 95th Cong., 1st Sess. 7 (1977) ("IEEPA House Report"). IEEPA's legislative sponsor noted that TWEA created "a dangerous situation in that it virtually conferred upon the President what could have been dictatorial powers . . . ." House Comm. on International Relations, Revision of Trading With the Enemy Act: Markup on HR 7738, 95th Cong., 1st Sess. 5 (1977) ("IEEPA House Markup"). To limit the breadth of Executive authority, IEEPA substituted a "new set of international economic powers, more restricted than those available during time of war . . . ." IEEPA House Report at 10.

TWEA confers upon the President a dual set of powers designed to prevent the transfer of foreign-held assets in the United States to hostile foreign nations and to secure those assets for the benefit of American creditors:[24] (1) the power temporarily to freeze or block the transfer of foreign-owned assets in the United States, 50 U.S.C. App. § 5(b)(1)(B);[25] and (2) the power summarily to seize and permanently vest title to foreign-owned assets and use them "for the benefit

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[24]*See, e.g., Mayer v. Garvan*, 278 F. 27, 35 (1st Cir. 1922). *See also Zittman v. McGrath*, 341 U.S. 471, 473-74 (1951); *Propper v. Clark*, 337 U.S. 472, 481, 484 (1949). Congress' major objective in enacting post-World War II amendments to TWEA was "to provide machinery for paying claims of creditors against the former owners of vested properties on an equitable basis to the extent that the assets vested from each debtor permit." S. Rep. No. 1839, 79th Cong., 2d Sess. 2 (1946); H.R. Rep. No. 2398, 79th Cong., 2d Sess. 1, 9-10 (1946).

[25]The legislative history of this provision indicates that when TWEA was first enacted in 1917, Section 5(b) limited the President's power to that of temporarily preserving the assets of an enemy. Congress retained for itself the power to determine whether and under what circumstances those assets should be returned to the enemy. S. Rep. No. 113, 65th Cong., 1st Sess. (1917), *reprinted in* Subcomm. on International Trade and Commerce of the House Comm. on International Relations, Trading With the Enemy, 94th Cong., 2d Sess. 158, 160 (1976) ("TWEA Report"); H.R. Rep. No. 85, 65th Cong., 1st Sess. (1917), *reprinted in* TWEA Report at 179, 181. In 1941, Section 5(b) was amended to provide the President permanent powers to vest, hold, use, administer, or liquidate the foreign property and at the same time, Congress also expanded the language in Section 5(b)(1)(B) describing the President's temporary blocking power. (The congressional debate is replete with references that the change in the language of Section 5(b)(1)(B) (the power temporarily to freeze foreign assets) was not intended to alter the fundamental nature of the blocking authority granted the President in 1917. *See, e.g.*, 87 Cong. Rec. 9862, 9865 (1941).) Significantly, Congress apparently concluded that the sweeping language in Section 5(b)(1)(B) of TWEA — which is relied upon by the Government today as it appears in Section 1702(a)(1)(B) of IEEPA as providing authority for it to dispose permanently of the Iranian assets attached by United States creditors — was insufficient to make a permanent disposition of enemy property. If, as Congress realized when it amended TWEA to add Section 5(b)(1), TWEA's Section 5(b)(1)(B) did not authorize the President permanently to dispose of foreign assets, Section 1702(a)(1)(B) of IEEPA — which precisely tracks the language of TWEA's Section 5(b)(1)(B) — clearly cannot be read to provide the President with any permanent property disposition power.

of the United States." *See id.* § 5(b)(1); Bishop, *Judicial Construction of the Trading With the Enemy Act*, 62 Harv. L. Rev. 721, 723 (1949). In connection with the second and more drastic set of seizing and vesting powers, Congress provided statutory protections for American creditors with claims against debtors whose assets were vested by the President. Specifically, American creditors of foreign nationals (and, following enactment of FSIA, foreign governments and their agencies) whose assets are seized or vested by the Executive may file their claims against the foreign debtor and are *entitled* to be paid out of those assets or their proceeds. 50 U.S.C. App. §§ 9, 34.[26]

IEEPA specifically excluded those portions of Section 5(b) of TWEA which authorized the President "(1) . . . to vest, *i.e.*, to take title to foreign property; (2) . . . to regulate purely domestic transactions; (3) . . . to regulate gold or bullion; and (4) . . . to seize records." IEEPA House Report at 15.[27] In sum, IEEPA continued the President's power

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[26]Section 34(a) provides:

> Any property or interest vested in or transferred to the Alien Property Custodian . . . *shall be* equitably applied by the Custodian . . . *to the payment of debts owed* by the person who owned such property or interest immediately prior to its vesting in or transfer. . . .

Id. § 34(a) (emphasis added). Section 34 also provides for a claims procedure, for priority and pro rata distribution among creditors when assets of the foreign debtor are insufficient to satisfy all valid claims, and for judicial review of administrative denial of claims. After Congress enacted Section 34, Section 9 proceedings were used for claims of secured creditors. *See generally* Bishop, *Judicial Construction of the Trading With the Enemy Act*, 62 Harv. L. Rev. 721 (1949).

[27]During deliberations over IEEPA, Congress did focus on the need to protect Americans with claims against foreign states for which there were no effective remedies — *i.e.*, claims against China and Czechoslovakia arising from expropriations during World War II and the Chinese Revolution. *Emergency Controls on International Economic Transactions: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 217-18 (1977); *Amending the Trading With the Enemy Act: Hearing Before Subcomm. on International Finance of the Sen. Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. 6, 15-17 (1977) ("*TWEA Senate Hearing*"); IEEPA House Markup at 6. To protect these claimants Congress granted the President the temporary power to freeze assets and negotiate settlements on behalf of these claimants. 50 U.S.C. §§ 1702, 1706; *see TWEA Senate Hearing* at 6, 15-17. Nothing in the history or language of IEEPA suggests, however, that this freezing power is broader than that under TWEA.

temporarily to "freeze" or "block" property of a foreign state but removed his powers under TWEA to "seize" or "vest 'any property or interest of any foreign country' . . . and to hold, use, administer, liquidate, sell, or otherwise deal with 'such interest or property' in the interest of and for the benefit of the United States." IEEPA House Report at 2, 4, 15.[28] *Compare* 50 U.S.C. App. § 5(b)(1) *with* 50 U.S.C. § 1702(a)(1)(B).

The section of IEEPA allowing the freezing of foreign assets empowers the President, upon declaration of a national emergency, to:

> [I]nvestigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.

50 U.S.C. § 1702(a)(1)(B). This section of IEEPA is taken verbatim from the freezing provisions of TWEA. Its broad language is unexceptional when considered in light of its original purpose in TWEA: to grant the President all possible authority to keep assets out of the control of hostile foreign powers during a war. In light of the derivation of Section 1702 and Congress' very reason for enacting IEEPA, however, there are at least two firm limits on the Executive power conferred by that elastic language. First, presidential authority is limited to *temporary* control over foreign assets by freezing or blocking transfers of possession or ultimate

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[28]Because, in contrast to TWEA, IEEPA did not grant the President the power permanently to vest and dispose assets, the need for explicit creditor protections like those in TWEA was alleviated. Nothing in the IEEPA legislative history hints that the President can under IEEPA abrogate the rights of creditors in a manner which would be forbidden under TWEA, or that he may turn IEEPA into a "confiscation measure." *Cf. Zittman v. McGrath*, 341 U.S. 471, 473-74 (1951) (custodian entitled to possess funds).

title; the section cannot empower the President permanently to dispose of the property. Second, presidential authority under IEEPA temporarily to freeze or block foreign assets cannot be greater than his analogous freezing power under TWEA.

The presidential action here broadly exceeds the authority granted him under IEEPA: far from temporarily freezing assets, as permitted by IEEPA, the President has ordered a permanent disposition of the foreign debtor's property by shielding it from the processes of American courts and ordering the property transferred overseas. The Government contends that this action is authorized under Section 1702(a)(1)(B) of IEEPA because the President has merely "directed" or "compelled" the "transfer" or "withdrawal" of the frozen assets. That construction, however, turns IEEPA on its head: under the Government's limitless reading of "transfer" and "withdrawal," the President can use the temporary freeze power that IEEPA confers to effect permanent disposition of foreign assets, a power IEEPA was intended to abolish.

The fundamental distinction between the authority to freeze foreign assets which IEEPA preserved and the vesting power which IEEPA abolished has always been that a freeze, however uncertain its precise duration, results in a temporary and not permanent disposition of foreign property. *See Markham v. Cabell*, 326 U.S. 404, 411 (1945); *Neilsen v. Secretary of the Treasury*, 424 F.2d 833, 843 (D.C. Cir. 1970). *See also* Littaver, *The Unfreezing of Foreign Funds*, 45 Colum. L.J. 132 (1945). Yet the President's "transfer" order here seeks to dispose of Iranian assets by permanently divesting American creditors of their statutory rights against the property. Once such transfer is effective, the freeze order will be "shorn of its temporary or interlocutory character,"

Neilsen, 424 F.2d at 844. The permanent "transfer" order here is for all practical purposes a vesting order.[29]

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[29]The Government has relied on *Orvis v. Brownell*, 345 U.S. 183 (1953), as support for that portion of the President's action "nullifying" all existing attachments of Iranian property. The Government's theory is that the Executive may forbid or regulate by license all attachments of and adjudication of rights in frozen assets, that the attachments here were only conditionally licensed, and that therefore the attachments can be nullified by "retroactive" revocation of the license. At best, however, that argument obscures the underlying issue — the scope of the Executive's authority under IEEPA. Whether or not the Executive may "nullify" existing attachments and forbid others during a freeze, he is attempting to exercise a far broader power here — the permanent transfer of foreign assets in derogation of the statutory rights of American creditors.

Furthermore, the Government's contention is incorrect — the license in this case was not subject to retroactive revocation. *See* Section III *infra*. This Court has squarely rejected attempts to nullify "retroactively" even unlicensed attachments of frozen assets and the adjudication of rights in the property as between a foreign debtor and an American creditor. *Zittman v. McGrath*, 341 U.S. 446 (1950).

Most importantly, the license here and its conditions are of no legal effect because the President's "freeze" authority does not empower him to regulate by license or forbid attachments of frozen property and adjudication of rights as between a foreign debtor and a domestic creditor that do not affect use, possession or control of the property during the freeze. Even under TWEA, this Court never decided whether under the freeze power the Executive "could . . . lump all attachments as prohibited 'transfers,' without reference to the nature of the rights acquired or steps taken under the various state laws providing for attachments . . . ." *Zittman v. McGrath*, 341 U.S. at 452.

Zittman upheld unlicensed attachments of, and judgments against, assets subject to a TWEA freeze order because no transfer of possession or ultimate title (as against the Alien Property Custodian) was involved. *Id.* at 463-64. In *Orvis*, the Government's leading authority, the Court held only that an unlicensed attachment was ineffective as against the Alien Property Custodian after he vested the property in the United States — *i.e.*, after he exercised the authority that IEEPA has now withdrawn from the President in peacetime. The attachment lien in *Orvis* did not create a priority to prevent pooling the property for distribution among all of the foreign debtor's creditors under Section 34 of TWEA. 345 U.S. at 188-89.

Assuming *Orvis* has any relevance in circumstances where the Executive has the power to freeze but not the power to vest, *Orvis* did not involve any nullification of an unlicensed judgment and attachment lien as between the foreign debtor and American creditor. Indeed, on that point *Orvis* reaffirmed *Zittman*. *Orvis*, 345 U.S. at 186-87. While it is true that dicta in *Orvis* referred to government "consent" to the

(footnote continued on following page)

The Government's construction of IEEPA's freeze authority to encompass the President's transfer of assets overseas is defective in another respect as well. That order would not be permissible under TWEA and the freeze power under IEEPA cannot be construed more broadly than under TWEA — IEEPA's freeze provision is taken verbatim from TWEA and IEEPA was enacted to limit Presidential power, not to expand it. If under TWEA the President ordered foreign property "transferred" to someone other than the Alien Property Custodian for other than a temporary period, he would evade the statutory protections provided for creditors of foreign debtors whose property was vested and thereby circumvent one of the principal purposes of the Act.[30] This

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unlicensed attachment in *Zittman*, *id.* at 187, nonetheless *Orvis* does not purport to decide the question relevant here and left unanswered in *Zittman*, 341 U.S. at 452 — whether the authority to freeze includes the power to forbid attachments and adjudications of rights in frozen property as between an American creditor and foreign debtor which do not affect the use, control or possession of the property during the freeze. *Zittman's* analysis of the statutory policy underlying the freeze authority strongly suggests it does not. *Id.* at 459-63. "Nothing in these state court proceedings have purported to frustrate the purposes of the federal freezing program. On the contrary, the effect of the State's action, like that of the federal, was to freeze these funds, to prevent their withdrawal or transfer to use of the [enemy]. . . . The sole beneficiaries are American citizens whose liens are not derived from the enemy but are adverse to enemy interests." *Id.* at 462-63; *accord*, Goodman, *United States Government Foreign Property Controls*, 52 Geo. L. J. 767, 797-98 (1964). *See also Lyon v. Singer*, 339 U.S. 841, 852 (1950); Brief of United States as Amicus Curiae at 33 n.31, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). That analysis applies even more forcefully under IEEPA where the Executive has no power over ultimate disposition of the property.

[30]In the only case in which the President's purported "transfer" power was discussed, the "transfer" involved a directive which sought physical possession of *vested*, not simply blocked, foreign property. *See Silesian-American Corp. v. Markham*, 156 F.2d 793, 795-96 (2d Cir. 1946), *aff'd sub nom. Silesian-American Corp. v. Clark*, 332 U.S. 469 (1947). If indeed the President could so clearly "transfer" alien assets under the freezing power to anyone and in any fashion he pleases, it is surprising that no President ever attempted to exercise such authority, either in connection with settlements in which foreign assets were unblocked or during World War II when the decidedly more inconvenient and more cumbersome vesting power was invoked.

Court's discussion in *Zittman v. McGrath*, 341 U.S. 471 (1951), of the relationship between Section 5(b) of TWEA and the statutory protections that TWEA provides for the claims of American creditors refutes any notion that TWEA's freeze power could lawfully be used to effect, as here, a "transfer" of a foreign debtor's property to the prejudice of the statutory rights of American creditors:

> While the statute under which the funds are to be "held, administered and accounted for" authorizes the vesting of . . . foreign-owned property in the Custodian and its administration "in the interest of and for the benefit of the United States," it is not for a confiscation measure, but a liquidation measure for the protection of American creditors.

Id. at 473-74.

Plainly the order directing the transfer of Iranian property out of this country will place those assets beyond the reach of American creditors and will, as a result, circumvent one of the principal legislative reasons for giving the President power over foreign assets: the preservation of such assets for the ultimate benefit of American creditors. *See Propper v. Clark*, 337 U.S. 472, 484 (1949); *Neilsen v. Secretary of the Treasury*, 424 F.2d 833 (D.C. Cir. 1970); *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 113 (2d Cir. 1966). *See also* Goodman, *United States Government Foreign Property Controls*, 52 Geo. L.J. 767, 786 n.107, 793 n.148 (1964).

Petitioner does not contend that the President is powerless under IEEPA to control the assets of a foreign state or national. On the contrary, his powers are vast with respect

to temporary disposition of those assets.[31] He is authorized, however, only to continue the freeze or to discontinue controls. It is one thing to allow blocking controls to expire, leaving American creditors to whatever judicial remedies they may then have, and quite another to act affirmatively to defeat the preexisting legal rights of American creditors to the benefit of the foreign debtor.

The mere incantation of the words "compel" and "transfer" should not be permitted to defeat the legislative purpose of granting the President the authority to freeze by transmuting the freeze power into a power of permanent disposition. This Court has frequently observed that TWEA, from which Section 1702(a) derives, must be read to conform to congressional policy notwithstanding certain literal interpretations of its words. In *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480 (1947), for example, the Court had to ignore the literal meaning of TWEA's language to implement what Congress obviously intended. The Court characterized TWEA as "hasty legislation which Congress did not stop to perfect as an integrated whole . . . . We are dealing here with conflict and confusion in the statute." *Id.*

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[31]The Government argues that one of the reasons for the blocking power was to freeze alien assets for possible future use in negotiating a settlement with the enemy. In two relatively recent cases, *Richardson v. Simon*, 560 F.2d 500 (2d Cir. 1977), and *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966), this purpose of foreign property controls was mentioned. To be sure the possible *unblocking* of billions of dollars of foreign assets previously frozen under a proper exercise of IEEPA authority is a powerful negotiating chip and has been used effectively in connection with settlements whereby, in exchange for an order unblocking assets, the foreign government has agreed to pay into a fund from which American claims would be paid. *See, e.g.*, Agreement Covering the Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306 (Chinese assets unblocked; China pays United States more than $80 million). Yet even when the blocking authority has been used in this manner, the Government points to no instance in which the Executive has ever transferred to a foreign government — as it proposes to do in this case — the blocked assets. *See generally* 1 Lillich & Weston, *International Claims: Their Settlement by Lump Sum Agreements* 229-33 (1975).

at 488-89. So too in *Markham v. Cabell*, 326 U.S. 404 (1945), and *Gusseffeldt v. McGrath*, 342 U.S. 308 (1952), the Court disregarded the literal implications of TWEA's terms in order to apply the statute consistently with legislative intent. In *Gusseffeldt*, the Court cautioned:

> The concern with the Trading With the Enemy Act is with problems at once complicated and far reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against the literalness of application. It favors a wide latitude of construction in enforcing its purposes.

342 U.S. at 319. Petitioner urges that the same view should obtain with respect to IEEPA, TWEA's successor, when a construction of its terms is advanced that clearly contravenes its legislative purpose.

III.

THE PRESIDENT'S ACTIONS HERE, EVEN IF AUTHORIZED, CONSTITUTE A TAKING OF PROPERTY WITHOUT JUST COMPENSATION AND SHOULD BE ENJOINED.

The Fifth Amendment prohibition against taking private property for public use without just compensation was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The limitations upon governmental action contained in the Just Compensation Clause of the Fifth Amendment apply even in the area of foreign affairs. *See, e.g., Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955); *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953). Where Fifth Amendment rights collide with foreign commitments made under an Executive agreement, those foreign commitments must yield. *See Reid v. Covert*, 354 U.S. 1, 14 (1957).

Assuming the President's actions in nullifying Petitioner's judgment and judicially-created security interests in Iranian property were otherwise authorized, those actions present a classic case in which the Fifth Amendment must be applied either to enjoin the President's actions or to assure payment of compensation to those deprived of property as a result of those actions.[32] There is no doubt that the objective of the Algerian Declarations — obtaining the release of American hostages held by the Iranian government — was a public purpose and a legitimate foreign policy goal. However, the Algerian Declarations burden exclusively the resources of a group of American businessmen with the costs of compliance with the Iranian ransom demands. "When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large." *San Diego Gas & Electric Co. v. City of San Diego*, 49 U.S.L.W. 4317, 4326 (March 24, 1981) (Brennan, J., dissenting). *See also Gray v. United States*, 21 Ct. Cl. 340, 392-93 (1886). The President can no more determine that secured American creditors of Iran must sacrifice their property to finance the achievement of American policy goals, without receiving compensation, than he could

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[32]Petitioner contends that the President's "settling" of its underlying contract claims against Iran and Iranian instrumentalities also constitutes a "taking" for which compensation is due. However, the issue of whether or not the "settlement" of contract claims constitutes a "taking" for Fifth Amendment purposes may not yet be ripe for review. Petitioner reserves the right to seek just compensation from the Government for the taking of its contract claims at a later date if, for example, any of the following events occur: (1) Petitioner is denied the opportunity to present its claims to the Arbitral Tribunal; (2) Petitioner establishes that its rights before the Arbitral Tribunal are demonstrably inferior to its rights to obtain redress in federal court, *see Chas. T. Main Int'l Inc. v. Khuzestan Water & Power Authority*, No. 80-1027, slip op. at 23 (1st Cir., May 22, 1981); or (3) Petitioner's claim is adjudicated by the Arbitral Tribunal but its recovery is less than the amount it would have obtained by proceeding on its judgment in federal court. *See American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779, slip op. at 41 (D.C. Cir., May 22, 1981).

determine that those property owners whose land lies in the path of a transcontinental highway constructed to expand foreign trade with Mexico or Canada will receive nothing for the loss of their property.

A. The Nullification of Petitioner's Attachments, Judgment and Judgment Liens Constitutes a Taking of Property.

Petitioner's attachments of Iranian assets created valid liens under the law of California, and as such, constituted vested property interests. *McCaffey Canning Co. v. Bank of America*, 109 Cal.App. 415, 423 (1930). The benefits accruing to a lienholder or mortgagee have long been recognized as "rights in specific property which are of substantial value" which are protected by the Fifth Amendment against uncompensated takings by the Government for public use. *Louisville Bank v. Radford*, 295 U.S. 555, 601-02 (1935).

Thus, in *Armstrong v. United States*, 364 U.S. 40 (1960), materialmen in Maine had asserted liens against certain vessels built for the United States by a contractor. Upon the contractor's default, the United States took title to the uncompleted ships and all the manufacturing materials acquired by the contractor for the construction of the vessels. The materialmen contended that the transfer of title destroyed their liens and thereby constituted a taking of their property without just compensation in violation of the Fifth Amendment. This Court agreed, explaining:

> Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens. . . . Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circum-

> stances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment.

Id. at 48-49.

The existence of alleged alternative remedies under which a creditor might obtain satisfaction of his debts (such as the possibility that Petitioner's claim may be adjudicated by the Arbitral Tribunal) has no bearing on the question of whether Petitioner's property was taken by the destruction of its otherwise valid liens. In both *Armstrong* and *Louisville Bank*, the creditors were not foreclosed from all avenues of legal redress which might have produced at least partial payment of their claims. As this Court stated in *Armstrong*, it is the right "to resort to the specific property for the satisfaction of their claims . . . [that is] compensable by virtue of the Fifth Amendment." 364 U.S. at 44.

Petitioner's $3.8 million judgment against the Government of Iran and the AEOI is a separate and distinct property interest, *Provident Savings Life Assurance Society v. Ford*, 114 U.S. 635, 641-42 (1885), protected under the Fifth Amendment. The judgment represents a liquidation of Petitioner's claim such that Petitioner is able to levy against Iranian assets wherever they might be located. By purporting to nullify this judgment, the President's actions have appropriated this property interest for public use.[33]

The Government argues that Petitioner's attachments of Iranian property are not property interests for Fifth Amendment purposes, because the attachments were sought and obtained after the issuance of Iranian Assets Control Reg-

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[33]The Government contends that this judgment was void *ab initio*, because it was not authorized by the Regulations, and could therefore be nullified. But the President has no authority to nullify, or require presidential permission for, a judgment of an Article III court. *See American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779, slip op. at 35-37 (D.C. Cir., May 22, 1981). Moreover, IEEPA plainly does not authorize blocking of entry of judgment *per se* so long as no foreign property is liened or transferred.

ulations, 31 C.F.R. Part 535 (the "Freeze Regulations"), by the Department of the Treasury in November 1979. The Government contends that the Freeze Regulations provide that all attachments obtained subsequent to the issuance of those Regulations are subject to revocation by the Government; thus, it is the Government's position that it has not taken a valid lien from Petitioner.

The Freeze Regulations did not operate to transform Petitioner's valid liens into mere revocable privileges. Neither the proclamations of the President in describing his freeze orders to the public, nor the language of the Freeze Regulations themselves, support the Government's contentions that attachments obtained during the freeze are revocable. When the President issued his freeze orders, the communications from the White House to the American people and to Congress stated that a purpose of the Regulations was to benefit American creditors of Iran. For example, the White House press release of November 14, 1979, stated that "the purpose of this order [the order freezing Iranian assets] is to insure that claims on Iran by the United States and its citizens are provided for in an orderly manner." Iranian Assets Litigation Reporter (Andrews Publications) at 140 (Feb. 8, 1980). Similarly, the President released a statement to Congress on November 14, 1979, that the freezing of Iranian assets was to "enable the United States to assure that these resources will be available to satisfy lawful claims of citizens and entities of the United States against the Government of Iran." *Id.*

The plain language of the Freeze Regulations is fully consistent with the President's assurances to American creditors. The Regulations initially provided that "unless licensed or authorized pursuant to this part, any attachment, judgment, decree, lien, execution, garnishment or other judicial process is null and void with respect to any property in which on or since the effective date there existed an interest in Iran." 31 C.F.R. § 535.203(e) (Nov. 15, 1979).

Six days later, the Treasury added that "the provisions of this part and any rulings, licenses, authorizations, instructions, orders or forms issued thereunder may be amended, modified or revoked at any time." *Id.* § 535.805 (Nov. 21, 1979). Subsequently, the Freeze Regulations were amended to authorize judicial proceedings (subject to explicit exceptions, including a denial of the right to judgment) relating to Iranian property. *Id.* § 534.504 (Nov. 26, 1979). Prejudgment attachments were authorized a short time later. *Id.* § 534.504(d) (Dec. 4, 1979).

The Freeze Regulations stated that the Government reserved the right to revoke its license to obtain attachments; accordingly, no new attachments could be obtained by creditors after the date of revocation. The Freeze Regulations did not state that attachments obtained prior to any such revocation might be declared retroactively revoked upon the withdrawal of authorizations.

This construction is borne out by the Government's actions after the Algerian Declarations were executed by Iran and the United States. At that time the Government, realizing that compliance with Iranian demands required the nullification of the attachments it had previously allowed to be obtained, promulgated Executive Order Nos. 12279, 12280 and 12281 (App. 43, 46 and 49) each of which provides, with respect to various types of Iranian property:

> 1-102(a) All licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment, or otherwise, including the license contained in Section 535.504 of the Iranian Assets Control Regulations, with respect to the properties described in Section 1-101 of this Order are revoked and withdrawn.
>
> (b) All rights, power and privileges relating to the properties described in Section 1-101 of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any

> litigation after November 14, 1979, at 8:10 a.m. E.S.T., including those derived from Section 535.504 of the Iranian Assets Control Regulations, . . . whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power, or privilege are hereafter barred from exercising the same.

These Executive orders do not simply consist of Paragraph 1-102(a), revoking and withdrawing the license to acquire attachments. The orders also contain Paragraph 1-102(b), which *separately* nullifies all rights, powers and privileges deriving from any attachments previously obtained. The additional Treasury regulations promulgated on February 26, 1981 to implement these Executive orders (the "Nullification Regulations") have exactly the same dual paragraph structure as the Executive orders. 31 C.F.R. § 535.218.

If the Government's position were correct, Paragraph 1-102(b) of the Executive orders (and the parallel section of the Nullification Regulations, 31 C.F.R. § 535.218(b)), would be irrelevant and unnecessary, because the revocation or withdrawal of the authorizations would have automatically terminated and extinguished attachments previously obtained under license. The fact that these provisions were drafted and published strongly suggests that the Government itself recognized that attachments obtained pursuant to the licenses extended by the Freeze Regulations had independent validity and that it was necessary separately to nullify them in order to meet the terms of the President's agreement with Iran.

The attachments that were obtained pursuant to Government authorization were not revocable and are property interests, the destruction of which invokes Fifth Amendment protections. Where "[t]here is a license which permitted a citizen to obtain property rights . . . [the] license may clearly be revoked, but such revocation means only that no future property interest may be obtained by a citizen. The

revocation does not in and of itself destroy property rights already acquired by a citizen." *Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM), slip op. at 78-89 (S.D.N.Y., June 11, 1981).

B. There Is No Reasonable, Certain and Adequate Provision for Petitioner's Obtaining Compensation; Accordingly, the Presidential Actions Should Be Enjoined.

Where, as here, the Government is acting to take private property for a public purpose, the taking need not be preceded or accompanied by the compensation. But the Fifth Amendment does require that there be "reasonable, certain and adequate provision for obtaining compensation . . . ." *Cherokee Nation v. Southern Kansas Railway*, 135 U.S. 641, 659 (1890), quoted in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974). Without this assurance of compensation, government action that amounts to a taking of private property is void. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952); *Becker Steel Co. v. Cummings*, 296 U.S. 74 (1935); *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

This constitutional requirement that compensation be assured is not lessened in this case by the fact that the exact dimensions of the taking of Petitioner's interests have not been established. To be sure, it is difficult for Petitioner to quantify the amount of damages it will suffer by reason of the nullification of its judgment, its attachments, and its judgment levies. Nevertheless, the decisions of this Court establish that the dimensions of the taking need not be certain in order for the Constitution to require assurance of Petitioner's right to compensation. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Armstrong v. United States*, 364 U.S. 40 (1960); *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952).

In *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952), for example, the Attorney General (as successor to the Alien Property Custodian) sought payment of two negotiable bearer debentures from the petitioners, who were the original obligor and the indenture trustee. The obligations represented by the debentures had been seized by the Alien Property Custodian under provisions of TWEA, upon a finding that the debentures were owned by a German resident and national, but the debentures were not in the possession of the Custodian. Thus the Court was faced with the "serious question . . . whether application of the seizure provisions of the Act to petitioners will take their property in violation of the Fifth Amendment, unless they have a remedy against the United States in the event a foreign court holds them liable to a holder in due course of the debentures." *Id.* at 334-35. While expressing skepticism as to whether this eventuality would occur, the Court agreed that there was a possibility of a foreign judgment that would effect a double recovery and held that petitioners would have the right to recoup from the United States in that event for a taking of their property. The Court stated: "[O]nly with this assurance against double liability can it fairly be said that the present seizure is not itself an unconstitutional taking of petitioners' property." *Id.* at 336.

There is no assurance of compensation in this case. Nothing in the various statutes claimed by the Government to authorize the President's actions here provides for compensation to those whose property is taken. Nor does the President have any inherent power to pay compensation:

> The President has no power to raise revenues. That power is in the Congress by Article I, Section 8 of the Constitution. The President might seize and the Congress by subsequent action might ratify the seizure. But until and unless Congress acted, no condemnation would be lawful. The branch of government that has the power to pay compensation for a seizure is the only

> one able to authorize a seizure or make lawful one that the President has effected.

Youngstown, 343 U.S. at 631-32 (Douglas, J., concurring) (footnotes omitted).

Nor is a remedy in the Court of Claims assured. The Tucker Act, 28 U.S.C. §§ 1491, *et seq.*, provides jurisdiction in the Court of Claims "to render judgment upon any claim against the United States founded . . . upon the Constitution . . . ." However, no remedy in the Court of Claims will be available if the President's actions here are deemed to be unauthorized. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127 n.16 (1974); *United States v. Goltra*, 312 U.S. 203 (1941); *United States v. North American Transportation & Trading Co.*, 253 U.S. 330 (1920); *Hooe v. United States*, 218 U.S. 322, 336 (1910); *NBH Land Co. v. United States*, 576 F.2d 317 (Ct. Cl. 1978); *see Youngstown*, 343 U.S. at 585. Even if the President's actions were authorized, jurisdiction in the Court of Claims may still be precluded by the treaty exception to jurisdiction, 28 U.S.C. § 1502, which states:

> Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.[34]

The authorities are in conflict as to whether the treaty exception would bar Petitioner from seeking redress in the Court of Claims. *Compare Hughes Aircraft Co. v. United States*, 534 F.2d 889 (Ct. Cl. 1976), *and Chas. T. Main Int'l Inc. v. Khuzestan Water & Power Authority*, No. 80-1027, slip op. at 24, (1st Cir., May 22, 1981), *with Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ.

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[34]International Executive agreements may be treated the same as treaties for purposes of this section. *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 903 (Ct. Cl. 1976).

7035 (CBM), slip op. at 83-84 (S.D.N.Y., June 11, 1981). Further, the Government is unwilling to concede that a remedy lies in the Court of Claims, or indeed in any court. Thus, there is no assurance that a remedy exists in the Court of Claims.

In the absence of "reasonable, certain and adequate" provision for compensation, the presidential actions under review here cannot stand. Moreover, this instance of presidential taking without certain remedy creates for Petitioner precisely the type of irremediable injury that an injunction is designed to avoid. The President has taken Petitioner's judgment and the security for enforcing that judgment. Were Petitioner to proceed to the Arbitral Tribunal only to find either that the Tribunal had no jurisdiction or that insufficient funds were available to pay Petitioner's claim, and were Petitioner then to return to the courts of this country to find that the Court of Claims has no jurisdiction to hear Petitioner's claim for compensation, Petitioner would have suffered irreparable harm. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

CONCLUSION.

For the reasons stated, the Order of the District Court denying Petitioner's motion for a preliminary injunction and granting the Government's motion to dismiss the Complaint for failure to state a claim upon which relief may be granted should be reversed.

Dated: June 18, 1981.

Respectfully submitted,

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